United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1409

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

BURNIE McCALL,

Appellant,

-against-

UNITED STATES OF AMERICA,

Appellee.

Docket No. 75-1409

BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
BURNIE McCALL
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

RICHARD A. GREENBERG,
Of Counsel.

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QUESTION PRESENTED

Whether there are any non-frivolous issues to be presented to this Court on appeal.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Western District of New York (The Honorable John T. Curtin) entered June 17, 1975, denying appellant McCall's pro se motion for an order directing the release to him of the names of all persons who appeared before the grand jury which returned the indictment (Cr-1970-163) against him in the Western District of New York.

By orders dated December 12 and 17, 1975, this Court granted appellant leave to appeal in forma pauperis, and The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Burnie McCall filed a motion in the District Court for the Western District of New York on June 2, 1975,[1] seeking the release to him of the names of all witnesses who appeared before the Western District grand jury which had

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[1] Appellant's pro se motion is "D" to the separate appendix to appellant's brief.

previously indicted him on October 6, 1970.[2] Appellant's basis for the motion was as follows:

> The veil of secrecy should be lifted to enable the defendant to determine if any of the witnesses who appeared before the grand jury in the Western District also appeared before the grand jury in the Southern District of New York which indicted the defendant for a conspiracy that completely overlapped in time the conspiracy alleged in this district.
>
> A collateral attack upon the judgment of conviction had in the Southern District of New York is being prepared by the defendant herein, and the defendant needs these names in order to properly prepare the moving papers to set aside the conviction.

Appellant's motion was denied by the District Court (Curtin, J.) on June 17, 1975,[3] for the reason that

> ...[t]he court cannot grant such a motion unless the movant has shown sufficient reason on which to base a relief that there were irregularities in the grand jury proceedings. The movant has not presented such reasons and the motion is, therefore, denied.

Appellant appeals from the order denying his motion.

The background facts necessary for an understanding of appellant's motion are as follows: The 1970 Western District indictment charged appellant and a co-defendant, Ronald Williams, with conspiracy to violate Federal narcotics laws (21

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[2] The Western District indictment is "B" to appellant's separate appendix.

[3] Judge Curtin's memorandum and order denying the motion is "C" to appellant's separate appendix.

U.S.C. §174) prohibiting the receiving, concealing, buying, selling, or facilitating the transportation, concealment, and sale of narcotics after such narcotics had been imported into the United States. The alleged conspiracy concerned narcotics transactions between New York City and Buffalo, New York, occurring from August 10, 1970, until October 6, 1970. In addition, appellant and the co-defendant were charged individually with a substantive violation of 21 U.S.C. §174 for allegedly concealing, selling, and facilitating the transportation, concealment, and sale of 138.6 grams of heroin on September 30, 1970.

On October 20, 1971, after the case was moved for trial before Judge Curtin and a jury, but before any witnesses were sworn,[4] the court dismissed the indictment as to both defendants. This action was based on the court's finding, after a hearing held outside the jury's presence, that the Government's evidence was the product of illegal wiretapping and the Government's disclosure that the narcotics which formed the basis of the substantive counts had disappeared from the Buffalo Police Property Clerk's office and could not be located.[5]

Subsequently, on November 20, 1972, appellant was indicted in the Southern District of New York (72 Cr. 1283) for conspir-

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[4]This information is gleaned from entries on the docket sheet, "A" to appellant's separate appendix.

[5]See Documents #32 and #36 to the record on appeal.

ing to sell narcotic drugs without receiving a written order from the buyer, in violation of 26 U.S.C. §§4705(a) and 7237 (b).[6] This alleged conspiracy concerned narcotics transactions between New York City and New Orleans, Louisiana, from March 1, 1970, to February 28, 1971. Appellant was convicted on December 6, 1972, after trial before The Honorable Harold R. Tyler, Jr., and a jury, and was ultimately sentenced to a seventeen-year prison term. On his direct judgment appeal to this Court, appellant argued, as he had in the District Court, that his conviction was for the same crime charged in the previously dismissed Western District indictment, and was therefore barred by the double jeopardy clause of the Fifth Amendment. Appellant also argued that his conviction was obtained, in part, by use of the same evidence Judge Curtin had already determined was the product of illegal wiretaps. This Court rejected both arguments in a written opinion, and affirmed appellant's conviction.

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[6] This information is gleaned from the decision of this Court affirming appellant's conviction in the Southern District on his direct judgment appeal (United States v. McCall, 489 F.2d 359 (2d Cir.), cert. denied, 419 U.S. 849 (1974).

STATEMENT OF POSSIBLE LEGAL ISSUES

The only legal issue on this appeal is whether appellant is entitled to disclosure of the names of the witnesses who appeared before the Western District grand jury which returned the first indictment against him. Rule 6(e) of the Federal Rules of Criminal Procedure provides, in relevant part, that disclosure of such information can be made only "when so directed by the court preliminarily to or in connection with a judicial proceeding." The standard used to determine when a court should direct disclosure is essentially one of balancing interests:

> Only when justice requires it or when the advantages gained by secrecy are clearly outweighed by a counterveiling interest in disclosure, e.g., when there is a particularized need ... should the veil be lifted.
>
> United States v. Marchisio, 344 F.2d 653, 670 (2d Cir. 1965) (emphasis added).

See also United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958). Thus, the question becomes whether appellant has so far shown a "particularized need" for the information he seeks.

Appellant contends in his motion that he needs the names of the grand jury witnesses in the Western District of New York in order properly to prepare a contemplated motion, prseumably pursuant to 28 U.S.C. §2255, collaterally attacking his convic-

tion in the Southern District of New York. The only indication contained in the instant motion as to the nature of the claim appellant will ultimately raise in his future §2255 motion is his contention that the Southern District conspiracy "completely overlapped in time" the one for which he was indicted in the Western District. While somewhat obscure, this contention can only be read to mean that appellant anticipates attacking his conviction on double jeopardy or collateral estoppal grounds.

On appellant's direct judgment appeal, this Court rejected the double jeopardy claim, not only because the elements of the crimes charged in the Western and Southern Districts were different, but also because

> ... the conspiracy charged in the Western District is entirely different from the conspiracy charged in the Southern District. Different evidence would be required to support convictions on the two indictments. The overt acts charged in the two indictments are different. And the Western District indictment charged a narcotics operation between Buffalo and New York City, whereas the instant conviction from which McCall appeals involved a narcotics operation between New York City and New Orleans.
>
> United States v. McCall, 489 F.2d 359, 362-363 (2d Cir.), cert. denied, 419 U.S. 849 (1974) (citations omitted).

In light of the foregoing, based on the information contained in appellant's motion and the other relevant documents, we fail to see how disclosure of the names of the grand jury

witnesses in the Western District would materially advance appellant's double jeopardy claim in a future §2255 motion. Even if appellant were supplied the names of the witnesses who testified before the grand jury in the Western District and they proved to be the same witnesses who testified for the Government at his trial in the Southern District, the same witnesses could have testified to the two entirely different conspiracies which this Court found existed.

In short, while appellant may well be able to demonstrate the basis for his request for the names of the grand jury witnesses when he ultimately files his §2255 motion, his present motion, with its extremely sparse allegations, fails to do so. However, should this Court grant this Anders motion and affirm the order denying appellant's motion, it should do so without prejudice to allowing appellant to make a similar application in the context of discovery proceedings in furtherance of his future §2255 application.

CONCLUSION

For the above-stated reasons, there are no non-frivolous issues which can be raised on appeal. Accordingly, The Legal Aid Society, Federal Defender Services Unit, should be relieved as counsel on this appeal.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
BURNIE McCALL
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

RICHARD A. GREENBERG,
Of Counsel.

CERTIFICATE OF SERVICE

January 20, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Western District of New York and to appellant.

Richard A. Greenberg